Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1088

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

HENRY A. KISSINGER,

Petitioner,

v.

MILITARY AUDIT PROJECT, *et al.*,

Respondents.

BRIEF OF RESPONDENT MILITARY AUDIT PROJECT, *et al.*, IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Petitioner as Secretary of State conducted a great deal of the Department's, and the nation's, business by

telephone. App. 56a, 71a, 74a. He caused these conversations to be reduced to a written record. App. 52a. After an early Freedom of Information request for some of the papers had been denied by the Department of State, App. 66a, petitioner on October 29, 1976, shipped the records to the private home of then Vice President Rockefeller in New York. App. 52a. In mid-December petitioner decided to "donate" the records to the Library of Congress. App. 77a. On December 24, 1976, petitioner executed a deed of gift to the Library, with a restriction preventing access by anyone but himself for 25 years. J.A. 57, 60, 61. On December 28 the records were shipped from the Rockefeller home to the Library. App. 53a. That same day respondent Military Audit Project (MAP) filed a Freedom of Information Act (FOIA) request for records of conversations with foreign government heads. J.A. 82. The Department of State denied the request on January 18, 1977, while petitioner was still Secretary of State and therefore still legal custodian of the records of that agency. J.A. 85. The denial claimed that those records that had been transferred to the Library were not "agency records." *Id.*[1]

The Department of State's and the Librarian of Congress' answer to MAP's complaint denied that the records sought were agency records. J.A. 28, 184. MAP moved for summary judgment. The government defendants' reply to the motion was a demand on petitioner to give the Department of State access to inspect the records in order to determine whether they were agency records

[1] As to the rest, the request was denied as too "broad." The Department of State subsequently agreed to withdraw its objection and to process the rest of the records under the FOIA. There is no issue remaining in this case except as to the records petitioner removed from the Department.

that the Department ought to reclaim. J.A. 190-202. Such access was afforded. J.A. 274-79. The Department never announced any result of its inspection, but the government defendants did not further oppose respondents' motions for summary judgment, did not appeal the district court's judgment and have ceased to assert that the records are not agency records.[2]

The district court held that the documents were agency records and ordered them returned to the Department of State for FOIA review and release. The opinion was followed by an order granting petitioner the unusual privilege of restraining, by application to that court on privacy grounds, the release of any documents under the FOIA. App. 60a-61a. The court of appeals affirmed the district court with a brief *per curiam* memorandum. App. 47a-50a.

ARGUMENT

None of petitioner's three issues is of substance deserving review by this court, as the court of appeals' prompt and summary affirmance of the district court confirms. Obviously a district court has the power and the duty to decide if records are agency records when that issue is raised in an FOIA suit. (Pet. 17-23) Obviously the All Writs Act gives a district court the power to order agency records returned to the agency in order that the court's jurisdiction, conferred by the FOIA, be preserved and its judgment given effect. (Pet. 13-17) And equally obviously, as this Court has held, agency screening of documents before release to the public, to preserve

[2] *See* Brief for the United States as Amicus Curiae, No. 78-1208 (D.C. Cir.) at 11-12 and *passim*.

privacy interests, is within agency power and does not violate a constitutional privacy right. (Pet. 24-27)

The "Agency Records" Issue

1. In a remarkably adroit avoidance of the plain words of the FOIA, petitioner argues that the courts below were bound to accept, without review, an agency assertion that documents sought under the FOIA were not "agency records." District court jurisdiction under the FOIA extends only to "agency records." 5 U.S.C. § 552(a)(4)(B). If an agency, in defending an FOIA action, asserts that the records sought are not "agency records," nothing could be clearer than the district court's duty, and power, to decide that question.

2. No live "agency records" issue was left in this case by the time it reached the court of appeals, and hence no live "agency records" issue is before this Court now. The government defendants have abandoned their assertion that the records were not agency records and have not appealed the district court's judgment (p. 8, *supra*). The "agency" thus accepts the determination that the records are "agency records." Petitioner, having given away the documents to the Library and having failed to cross claim against the Library to restrain transfer to the Department of State (as the complaints had prayed) is without standing to oppose the government's willing compliance with the district court's order.

3. Petitioner places great reliance on the asserted regularity of the Department of State's determination that the documents were petitioner's private property, as embodied in the Department of State Legal Adviser's Memorandum of November 11, 1976. (Pet. 20, 22) Petitioner hopes that the Court will forget that two weeks before he thought to obtain the Legal Adviser's

written opinion, petitioner had shipped the documents off to the private home of then Vice President Rockefeller. App. 52a. Resort to the Legal Adviser seems to have been an afterthought about what kind of paper record had to be created to cover the documents' departure from the Department; as petitioner's "gift" to the Library seems to have been afterthought about where the documents might lawfully be stored.

Petitioner also seems to hope that the Court will forget that at all times pertinent, i.e., when the Department of State's supposedly "regular" determination was made; when the documents were shipped to the Rockefeller home; when they were re-shipped to the Library of Congress; when respondents' FOIA requests were made, and when respondents' FOIA requests were denied, petitioner was Secretary of State and himself head of the Department. Determinations made by petitioner's subordinates awarding immensely valuable documents to petitioner and then denying that the public had any FOIA right of access to the documents may not be quite so "regular" after all. The change of mind at the Department, now that petitioner is no longer its master, in accepting the district court's order to recapture the documents and process them under the FOIA, is not irrelevant.

4. Petitioner's artful congeries of regulations, common law cases and denigration of the quality of the documents (*see*, e.g., Pet. 20) skips over the heart of the district court's holding on the merits of the "agency records" issue—that the content of the documents, recording important government business, was dispositive. App. 55a-56a (footnotes omitted):

> Dr. Kissinger's final argument, based on the proposition that creation of the extracts fully

satisfied the State Department's record-keeping requirements, is that the notes are personal working papers, not "agency records" and not subject to an FOIA request. . . .

State Department regulations require documentation of all official activities in order to "facilitate the making of decisions and policies and the taking of actions" by Department employees and "to provide materials for research and historical purposes." 5 Foreign Affairs Manual [FAM] § 423.1. *See* 41 C.F.R. § 101-11.202-2(a). This requirement extends to all "decisions, commitments, and discussions of any significance which are oral in nature." 5 FAM § 423.2-1. *See* 41 C.F.R. § 101-11.202.2(b). Involved here are high-level conversations of the Secretary of State. The significance of the commitments, decisions, and discussions embodied in these conversations is apparent from the stature of the other parties to them (two presidents, heads of state, cabinet officers, diplomats, legislators, scholars, journalists, and others) and is underscored by a Department policy which prohibits monitoring of telephone conversations except when "absolutely essential to the conduct of business." Consequently, under his own regulations, Dr. Kissinger had no alternative but to document the matters discussed in the conversations.

The *Bannercraft* Issue

1. The Library's and Department's failure to appeal robs petitioner's *Bannercraft* issue of viability as it does his "agency records" issue. The district court relied on inherent equity power to order the Library to ship the documents to the Department and to order the Department to process them under the FOIA. Both the Library

and the Department are ready, willing and able to comply; indeed, only this Court's earlier stay restrains them from immediate compliance. With the parties directly affected willing to accept the district court's exercise of equity power, petitioner's challenge waves weakly in the air.

2. In any event the lower courts did no more than follow this Court's direction in *Bannercraft* and Congress' direction in the FOIA.

a. The FOIA expressly empowers district courts "[o]n complaint . . . to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).[3] There is no limitation in the statute on who may be named a defendant in such a complaint or who may be made subject to such an order.[4]

b. In *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 17-20 (1974), this Court held that the FOIA's express grant of power "to enjoin the agency from withholding agency records," 5 U.S.C. § 552(a)(4)(B), did not "limit the inherent powers of an equity court," 415 U.S. at 20. The Court held that many of its earlier decisions recognized "broad equity power," "sometimes related to the All Writs Act, 28 U.S.C. § 1651(a)." 415 U.S. at 18-19. In other words, in order to prevent a defeat of its jurisdiction, conferred by

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[3] Section 552(a)(4)(B) also provides for court inspection of records in camera to decide contested claims of exemption. A court must have power to order the production of such records from whomever may have them in order to carry out that responsibility.

[4] Unlike the preceding phrase, which confers power to enjoin an "agency" from withholding.

Congress, to enforce the FOIA, a district court may exercise powers traditionally exercised by courts of equity by way of injunction, mandamus and the other chancery writs incorporated in the All Writs Act. There is hardly anything novel in an injunction issued to the Library of Congress against continuing to hold agency records of the Department of State and ordering their return to the Department of State in order that the Department may comply with the requirements of the FOIA.

The Privacy Issue

Petitioner's privacy issue boils down to an objection to screening of the documents by State Department personnel. That screening will separate petitioner's private and personal material from material disclosable under the FOIA. The district court's order expressly preserved petitioner's power to prevent release of personal material. App. 60a-61a.

Government authority to screen documents to prevent disclosure of private matter, while releasing what must be released under the FOIA, has been expressly approved by this Court. *Department of the Air Force v. Rose*, 425 U.S. 352, 381 (1976). Such screening was expressly approved under the FOIA analogue, the Presidential Materials Act, in *Nixon v. Administrator of General Services*, 433 U.S. 425, 455, 459, 462-65 (1976).

Petitioner lamely attempts to distinguish *Nixon* as applying only to former President Nixon as "a legitimate class of one," argued to be unique among government officials. The phrase appears only in the Court's discussion of the Bill of Attainder issue in *Nixon*, and that is its only application. Petitioner obviously does not assert that the FOIA is a bill of attainder as applied to him.

CONCLUSION

The issues petitioner raises are largely manufactured of whole cloth. The petition for certiorari should be denied.

Respectfully submitted,

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